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Evidentiary Use of Other Crime Evidence: A Survey of Recent Trends in Criminal Procedure

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I. INTRODUCTION

When writing a survey article, there is a tendency for the author to search for some defect in the law of the surveyed cases, in order to demonstrate the author's acumen in theoretical reasoning, as opposed to that of the courts'. However, this survey topic—the admissibility of evidence of other bad acts and crimes in a criminal trial—does not lend itself to such a self-serving exercise. The law in Indiana with respect to this relatively narrow subject area is instead well-established and generally well-reasoned. This survey period did include, however, several cases in which the practical application of the extant law rested upon a questionable foundation or was altogether improper. In most instances, the error was harmless, but the precedential use of such improper reasoning could well prove damaging in later cases. The purpose of this Article, therefore, is not to remedy any flaw in the law but to suggest a more temperate and circumspect approach to its practical application. Because of the frequency with which one specific context occurred during the survey period, the Article will particularly emphasize the principles governing the admissibility of unrelated crimes and other bad acts as they are relevant to the charges at trial.

II. TRIAL ADMISSION OF OTHER CRIMES AND MISCONDUCT GENERALLY

The general rule in Indiana is that evidence of crimes and misconduct of a criminal defendant, other than of the charged offenses, is not admissible at trial.[1] However, there are various exceptions to this rule of exclusion. Their application arises either when the defendant's character is at issue or when the proffered evidence is relevant to an element of the charged offense. The four exceptions most widely recognized in Indiana relate to (1) the defendant's bad character, (2) proof of the

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[1] *E.g.*, Lee v. State, 271 Ind. 307, 312, 392 N.E.2d 470, 474 (1979); Bruce v. State, 268 Ind. 180, 245, 375 N.E.2d 1042, 1077, *cert. denied*, 489 U.S. 988 (1978); Paulson v. State, 181 Ind. App. 559, 560, 393 N.E.2d 211, 212 (1979).

crime on trial, (3) the *res gestae* of the charged offense, and (4) cumulative and/or explanatory evidence after the defendant himself has broached the subject.

A. Admissibility to Prove Defendant's Character

There are two reasons why a court may admit evidence of other crimes to show a defendant's unsavory character. The foremost reason is to impeach the defendant's credibility as a witness.[2] This particular "bad character" exception has statutory underpinnings,[3] but its evidentiary use is limited to a defendant's "prior convictions for crimes which would have rendered a witness incompetent. These crimes are: treason, murder, rape, arson, burglary, robbery[,] kidnapping, forgery and wilful and corrupt perjury."[4] The rationale for allowing such use is that the nature of the convictions reflects upon a witness's propensity for truth and veracity while testifying at trial.[5]

The second use of "bad character" evidence, on the other hand, permits introduction of a wider array of bad conduct but can only be applied on a more limited scope. This use occurs when a criminal defendant places his character directly into evidence as part of his defense strategy. Once a defendant's reputation for good character is at issue, the state may then offer specific acts of prior misconduct into evidence as contradictory proof of bad character.[6] However, use of bad character evidence for this purpose is limited by rules of relevance and therefore must go directly to contradict the defense's evidence.[7] Such a limitation is to assure, to the extent possible, that the bad character evidence is circumscribed for use only as rebuttal evidence rather than as substantive proof of the defendant's guilt of the charged offense.[8] Therefore, in

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[2]*See* Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 IND. L.J. 1, 23 (1958).

[3]IND. CODE § 34-1-14-14 (1982) states, "Any fact which might heretofore be shown to render a witness incompetent, may be hereafter shown to affect his credibility."

[4]Ashton v. Anderson, 258 Ind. 51, 63, 279 N.E.2d 210, 217 (1972); *see also* Daniels v. State, 274 Ind. 29, 32, 408 N.E.2d 1244, 1246 (1980).

[5]*Ashton*, 258 Ind. at 62, 279 N.E.2d at 217 ("only those convictions for crimes involving dishonesty or false statement shall be admissible"). The Indiana Supreme Court has further declared that a witness' credibility may be impeached only by *convictions*, not generic bad acts. Hensley v. State, 256 Ind. 258, 262, 268 N.E.2d 90, 92 (1971).

[6]*E.g.*, Hauger v. State, 273 Ind. 481, 483, 405 N.E.2d 526, 527 (1980); Robertson v. State, 262 Ind. 562, 565, 319 N.E.2d 833, 835 (1974).

[7]*See* Bond v. State, 273 Ind. 233, 240-41, 403 N.E.2d 812, 818 (1980); *Robertson*, 262 Ind. at 566, 319 N.E.2d at 836.

[8]*See, e.g.*, FED. R. EVID. 404, which states: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ."; 22 C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5236, at 397 (1978) [hereinafter FEDERAL PRACTICE & PROCEDURE].

either of these two situations, a prosecutor may not generally impute bad character through evidence of other crimes unless the defendant first places his character at issue, either directly or by merely taking the witness stand. However, there are other situations in which a prosecutor may offer such evidence for the purpose of substantively proving guilt, aside from bad character generally.

B. Admissibility to Prove Charged Offense

A second method of circumventing the general prohibition against use of other crime evidence is to proffer other unrelated crimes and bad acts as relevant proof that the defendant committed the offense with which he is charged.[9] The Indiana Supreme Court adopted this exclusion long ago when it stated:

> "It is only on rare occasions that proof of the commission of another crime by a defendant is either necessary or helpful towards establishing the crime with which he is charged. Hence the evidence is ordinarily irrelevant, while at the same time its admission would necessarily operate to so prejudice a jury against a defendant as that in a doubtful case it might control the verdict. * * * But it has never been held by any court of responsible authority that the people cannot prove the facts constituting another crime, when those facts also tend to establish that the defendant committed the crime for which he is on trial. Such a holding would accomplish the absurd result of permitting a rule intended to prevent a defendant from being prejudiced in the eyes of the jury because of his life of crime to so operate in certain cases as to prevent the people from proving the facts necessary to convict him of the crime charged."[10]

Further refinement of this principle has especially focused on the relevancy of the other crime evidence to specific facts in dispute.

Indiana appellate courts look chiefly at whether the evidence of unrelated crimes proves or tends to prove a fact in issue at trial.[11] This connection has been variously characterized as "a fact in issue,"[12] "any

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[9]*See, e.g.*, Hergenrother v. State, 215 Ind. 89, 18 N.E.2d 784 (1939).

[10]*Id.* at 94-95, 18 N.E.2d at 787 (quoting People v. Molineux, 168 N.Y. 264, 340, 61 N.E. 286, 312 (1901)).

[11]*See, e.g.*, Tippett v. State, 272 Ind. 624, 627, 400 N.E.2d 1115, 1117-18 (1980); Bruce v. State, 268 Ind. 180, 245, 375 N.E.2d 1042, 1077, *cert. denied*, 439 U.S. 988 (1978); Maldonado v. State, 265 Ind. 492, 495, 355 N.E.2d 843, 846 (1976); Kallas v. State, 227 Ind. 103, 114, 83 N.E.2d 769, 773 (1949).

[12]*Tippett*, 272 Ind. at 627, 400 N.E.2d at 1118; *Maldonado*, 265 Ind. at 495, 355 N.E.2d at 846; Gaston v. State, 451 N.E.2d 360, 363 (Ind. Ct. App. 1983).

material fact,"[13] "any essential element of the crime charged,"[14] and "an issue in serious dispute at the trial."[15] As succinctly stated by the Indiana Supreme Court: "[T]he law will not permit the State to depart from the issue, and introduce evidence of other extraneous offenses or misconduct that have no natural connection with the pending charge . . . ."[16] This restriction obviously prevents the introduction of other crime evidence merely to present the defendant to the jury as a person with a "criminal bent."[17] The state therefore is constrained to present other crime evidence only in the context and within the confines of the charged offense. This principle is the rule of logical relevance.[18]

Typically, other crime evidence can be fitted into specific categories of logical relevance. The list of categories—intent, motive, purpose, identity, common scheme or plan, and guilty knowledge—has been recited so frequently as to approach the form of a litany.[19] And the admission of evidence within these categories may be appropriate not only for proving the commission of the charged offense but also for disproving a defense.[20] There exists a further well-recognized category in Indiana law in which evidence of a more general pattern (rather than of discrete offenses) is admissible. This pattern is admitted for its tendency to prove a defendant's guilt at a sex offense trial under the "depraved sexual instinct" exception.[21] Under the current state of the law then, Indiana courts have established fairly well-defined guidelines for admitting evidence of other crimes under the relevancy exception.

There is, however, a further limit on this exception, regardless of the evidence's logical relevance to the trial. Even if the logical relevance of other crime evidence is established within the categories listed above,

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[13]*Kallas*, 227 Ind. at 114, 83 N.E.2d at 773.

[14]*Hergenrother*, 215 Ind. at 96, 18 N.E.2d at 787.

[15]Thornton v. State, 268 Ind. 456, 458, 376 N.E.2d 492, 493 (1978).

[16]Dunn v. State, 162 Ind. 174, 182, 70 N.E. 521, 523 (1904).

[17]*Bruce*, 268 Ind. at 245, 375 N.E.2d at 1077; *see also* Lee v. State, 271 Ind. 307, 312, 392 N.E.2d 470, 474 (1979).

[18]*See, e.g.*, FED. R. EVID. 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[19]*See* Haynes v. State, 411 N.E.2d 659, 664 (Ind. Ct. App. 1980); *see also* Cobbs v. State, 264 Ind. 60, 62, 338 N.E.2d 632, 633 (1975); Paulson v. State, 181 Ind. App. 559, 560, 393 N.E.2d 211, 212 (1979).

[20]*E.g.*, Jackson v. State, 267 Ind. 62, 66, 366 N.E.2d 1186, 1189 (1977), *cert. denied*, 435 U.S. 975 (1978); Henderson v. State, 259 Ind. 248, 251, 286 N.E.2d 398, 400 (1972); *Kallas*, 227 Ind. at 122, 83 N.E.2d at 777.

[21]*E.g.*, Bowen v. State, 263 Ind. 558, 563, 334 N.E.2d 691, 694 (1975); Miller v. State, 256 Ind. 296, 299, 268 N.E.2d 299, 301 (1971); Lamar v. State, 245 Ind. 104, 109, 195 N.E.2d 98, 101 (1964). The "depraved sexual instinct" exception is utilized only where the offenses exhibit an "unnatural" sexual proclivity, such as for sodomy or for incest. *Cobbs*, 264 Ind. at 62-63, 338 N.E.2d at 633-34.

a court may still exclude it if such evidence lacks legal relevance.[22] Evidence is legally irrelevant if it will mislead the jury or if it is too remote from the charged offense.[23] Evidence of other crimes is inherently prejudicial to some extent. For such other crime evidence to be admissible, therefore, its probative value must substantially outweigh its prejudicial effect on the jury.[24] Otherwise, it may seriously affect the defendant's right to a fair trial,[25] and trial courts, in their discretion, may exclude it.[26]

In sum, the chief concern with respect to legal relevance is whether the jury is likely to find a defendant guilty due to his mere participation in other crimes rather than upon proof of the elements of the charged offense. The relevancy exception for the introduction of other crime evidence is therefore in counterpoise to the bad character exception because the trial court's primary purpose is to exclude evidence that is relevant only to showing a defendant's bad character. In contrast, the *res gestae* and cumulative evidence exceptions evince very little concern regarding the substantive effect of evidence of bad character.

C. Admissibility Under Miscellaneous Exceptions

There are two other instances in Indiana where the general rule of exclusion can be overridden by the circumstances of the individual case. The first, the *res gestae* exception, permits the admission of evidence of other crimes where they are part of the same transaction. Such evidence includes "acts, statements, occurrences and circumstances substantially contemporaneous with the crime charged."[27] This exception, too, is not without bounds and is committed to the sound discretion of the trial court.[28]

The final exception is more an estoppel of the defendant's right to object to the admission of other crime evidence than a true exception. This estoppel occurs when the defense "opens the door" by eliciting

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[22]*See, e.g.*, FED. R. EVID. 403, stating that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[23]*Hergenrother*, 215 Ind. at 94, 18 N.E.2d at 786.

[24]*See supra* note 22; *see also Paulson*, 181 Ind. App. at 561, 393 N.E.2d at 212.

[25]*Thornton*, 268 Ind. at 458, 376 N.E.2d at 493.

[26]Malone v. State, 441 N.E.2d 1339 (Ind. 1982); Wilson v. State, 432 N.E.2d 30 (Ind. 1982); *Tippett*, 272 Ind. at 627, 400 N.E.2d at 1117-18; *Thornton*, 268 Ind. at 458, 376 N.E.2d at 493; Manuel v. State, 267 Ind. 436, 438, 370 N.E.2d 904, 905-06 (1977).

[27]Lee v. State, 267 Ind. 315, 320, 270 N.E.2d 327, 329 (1977) (citation omitted); Gross v. State, 267 Ind. 405, 407, 370 N.E.2d 885, 887 (1977) (quoting Kiefer v. State, 241 Ind. 176, 178, 169 N.E.2d 723, 724 (1960)).

[28]Blankenship v. State, 462 N.E.2d 1311, 1313 (Ind. 1984).

testimony of other crimes directly[29] or by introducing testimony of only part of a story, the completion of which includes evidence of other crimes.[30] Clearly, a defendant has no right to complain of the state's use of such evidence when he was the party who broached the subject in the first instance. Beyond these two miscellaneous exceptions, the main inquiry into the admissibility of other crimes evidence is still whether the defendant has placed his reputation in issue or whether the state can convince the court that the evidence is both logically and legally relevant to a material fact at issue.

III. Recent Cases

Most of the notable recent cases concerned the relevancy exception, although a few cases pertained to the other three exceptions. The surveyed cases range from the well-reasoned *Burch v. State*,[31] where the Indiana Court of Appeals was faced with an alibi defense and the dilemma of proving identity with evidence of another crime, to the scantily reasoned *Stout v. State*,[32] which upheld the admissibility of an accomplice's testimony to a defendant's participation in prior crimes by relying on but a single precedent which had no rationale. Between these two extremes were cases addressing the use of an evidentiary "harpoon" and proper and improper admissions of police investigations, as well as an assortment of cases where the court reached the right result despite the reasons given.

Critiquing these cases is difficult because any analysis of relevancy is necessarily subjective. No bright-line objective template can be applied by appellate courts to such cases because the standard of review is whether the trial court abused its discretion.[33] It is clear in some cases, however, that the evidence had little, if any, relevance to the case and its admission would have been prejudicial error but for the harmless error doctrine.[34] This Article attempts to demonstrate flaws in the applications of the law and to suggest how these problems may be resolved.

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[29]*See, e.g.*, Gilliam v. State, 270 Ind. 71, 76-77, 383 N.E.2d 297, 301 (1978).

[30]*See, e.g.*, Davis v. State, 481 N.E.2d 387, 389-90 (Ind. 1985).

[31]487 N.E.2d 176 (Ind. Ct. App. 1985).

[32]479 N.E.2d 563 (Ind. 1985).

[33]*E.g.*, Wagner v. State, 474 N.E.2d 476, 493 (Ind. 1985); Fisher v. State, 468 N.E.2d 1365, 1368 (Ind. 1984); Mayes v. State, 467 N.E.2d 1189, 1194-95 (Ind. 1984) ("Trial courts have wide discretion in determining whether proffered evidence is relevant. We will not disturb the court's ruling upon such a matter, absent a clear abuse of that discretion.").

[34]*See* Fed. R. Civ. P. 61; *see also* Fed. R. Crim. P. 52(a), which states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

A. Right Result, Right Reason

One of the best reasoned cases of the survey period also included one of the closest judgment calls. In *Burch v. State*,[35] a jury found the defendant guilty of attempted robbery and battery, both while the defendant was armed with a deadly weapon.[36] The state's case relied upon the following salient facts: On Thursday, November 3, 1983, at 7:45 p.m., the defendant accosted a Ball State University co-ed on the second level of a parking garage on the university campus. The defendant "goosed" the victim and then followed her to her car, questioning her about her plans for the evening. When they reached the victim's car, the defendant drew a knife and ordered her into her car. After she refused, the defendant pressed the knife to her chest and demanded her backpack from the car. A struggle ensued, and the defendant fled. The victim identified Burch as her assailant. Burch interposed an alibi defense.[37] To impeach the alibi, the state presented evidence of a similar uncharged attack.

Another Ball State co-ed testified to an incident that occurred the following Thursday evening, in the same location of the same parking garage and with similar sexual overtones. The victim of this second incident, however, recognized her attacker and was able to locate his—the defendant's—photograph in her high school yearbook. The state argued this other crime testimony was essential to surmount the defendant's alibi.[38] The court of appeals agreed.[39]

After a thorough analysis of the factual similarities and the differences in the two incidents, the court determined that the key similarities in the two occurrences—time, location, and sexual characteristics—presented a similar and distinctive "modus operandi," relevant to the question of the assailant's identity raised by the defendant's alibi defense.[40] The court admitted that the facts presented "a very close question," but because "identity was *the* primary issue," the other crime evidence was crucial to the state's case and therefore was admissible.[41] However close the question, under the abuse of discretion standard, the court reached the correct conclusion.

The "modus operandi" exception to the general rule is a well-recognized method of proving identity.[42] To fit within this category,

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[35]487 N.E.2d 176 (Ind. Ct. App. 1985).
[36]*Id.* at 177.
[37]*Id.* at 179.
[38]*Id.*
[39]*Id.*
[40]*Id.*
[41]*Id.* (footnote omitted).
[42]*See* FEDERAL PRACTICE & PROCEDURE, *supra* note 8, § 5246, at 512.

"[t]he acts or methods employed must be so similar, unusual, and distinctive as to earmark them as the acts of the accused."[43] The difficulty with the facts in *Burch* is that sexual attacks upon women in parking garages are not uncommon. However, repeated attacks at the same time on the same day of the week at the same location do create a distinctive pattern. The fact that both victims positively identified the defendant as their assailant greatly lessened the opportunity for error and added yet another distinguishing feature to the "modus operandi" of the attacks. The nature of the other crime evidence was also not so inflammatory as to make it legally irrelevant. Therefore, this evidence was properly admitted because the exception's requirements were scrupulously applied.

The "modus operandi" exception was also the compelling reason for admitting evidence of other bad acts in *Eakins v. State*.[44] In *Eakins*, a high school music teacher was charged with battery and telephone harassment arising out of an incident with one of his female students.[45] During her freshman year, the young girl had complained to school authorities about the defendant's amorous attentions to his female students as well as his physical contacts with them. During the following school year, the defendant hugged and kissed the complainant. Not long afterward, the girl's family began to receive harassing and obscene telephone calls that were later traced to the defendant's home. The girl identified the defendant as the caller. However, the defendant evidently denied the allegation because the identity of the caller became the focal issue at trial.[46] In response to the defendant's apparent denial, the state introduced testimony of a former student who described her sexual relationship with the defendant.[47] This former student testified that when she terminated her involvement with the defendant, she received an abusive telephone call from him as well as repeated hang-ups. Although the similarity of events is perhaps not as distinctive as in *Burch*, the two incidents here were significantly unique because both girls were familiar with the defendant and the sound of this voice. Because telephone offenses are so intrinsically difficult to prove inasmuch as the victim does not see the perpetrator, the other crime evidence in this case was extremely logically relevant to the issue of the caller's identity.[48] Thus,

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[43]Willis v. State, 268 Ind. 269, 272, 374 N.E.2d 520, 522 (1978) (citation omitted).

[44]484 N.E.2d 607 (Ind. Ct. App. 1985).

[45]*Id.* at 608.

[46]*Id.* The facts are not clear with respect to the defendant's case. The only other issue addressed on appeal concerned "newly discovered" evidence that the defendant's son had made similar telephone calls. *Id.* at 609. One can therefore assume that the defendant denied any part in the offense; otherwise, this newly discovered evidence would not have been necessary.

[47]*Id.* at 608.

[48]The appellate court could have easily sidestepped the issue entirely. *Eakins* was tried to the court, rather than before a jury, and there exists a presumption in Indiana

the logical relevance exception to the general rule of exclusion was properly applied under the circumstances, and the evidence was properly admitted.[49]

One other notable case in which the identity of the perpetrator was seriously in dispute was *Henderson v. State*.[50] In *Henderson*, the defendant was on trial for burglary and theft arising from facts relayed to police by an eyewitness.[51] The witness observed a man leave a neighbor's home with a television set and place the set in a gold Ford LTD bearing Indiana license plate number 99H8889. The police later discovered that the defendant owned a Ford with Indiana license plate number 99T8889, but the witness had some difficulty identifying the defendant.[52]

At trial, defendant challenged her identification evidence.[53] In response, the state offered and the trial court admitted the testimony of one Alonzo Bellmar.[54] Bellmar, in a later incident, had chased a man he discovered exiting his home through a window. This man, identified as the defendant, ran toward a tan Ford with Indiana license plate number 99T8889 parked nearby before Bellmar lost sight of him. The Indiana Supreme Court dismissed the state's argument that Bellmar's other crime testimony fit within the common scheme or plan exception[55] but declared the evidence highly relevant to the issue of identity and therefore admissible.[56] The only significantly identifiable feature here, besides the witnesses' identification, was the license plate number. That

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law that a trial court ignores improperly admitted evidence, absent any indication it significantly affected the court's decision. *E.g.*, Pinkston v. State, 436 N.E.2d 306, 308 (Ind. 1982); Phelan v. State, 273 Ind. 542, 546, 406 N.E.2d 237, 239 (1980).

[49]*Eakins*, 484 N.E.2d at 609. The court also stated that the evidence fit the common plan or scheme exception. *Id.* Indiana courts seem frequently to confuse the "modus operandi" exception with the common plan or scheme exception. This latter exception is used to "prove the existence of a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part." E.W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 448 (2d ed. 1972) (footnote omitted) [hereinafter HANDBOOK OF EVIDENCE]. It is apparent from the facts in *Eakins* that there were two separate, distinguishable incidents that were not smaller parts of any larger, deliberate scheme to seduce and then harass the female student population of the high school. The defendant could not have had a deliberate plan in mind that both relationships would be ended by the victim and he would subsequently harass them by telephone. Rather, the cause and effect nature of both offenses would make the "motive" exception to the rule much more applicable than the common scheme or plan exception.

[50]489 N.E.2d 68 (Ind. 1986).

[51]*Id.* at 69.

[52]*Id.* at 70. She was acquainted with and recognized the defendant but had at first confused his name with that of someone else. *Id.*

[53]*Id.*

[54]*Id.* at 70-71.

[55]*Id.*

[56]*Id.* (presumably, although not denominated so, under the "modus operandi" exception).

evidence was so specific and so singular as to be the hypothetical "silver cross-bow" regarded as ideal signature evidence of a perpetrator.[57] Such a perfect example of the "modus operandi"/identity exception is obviously rare. Where identity was the issue and the jury would not be misled, there could be no argument that the evidence was neither logically nor legally relevant. The evidence was properly admitted.

The unfortunate Leroy Williams was the defendant in two cases during the survey period.[58] In the first *Williams v. State*,[59] Williams was apprehended in the home of 74-year-old Mabel Carpenter. Williams advised the police that he had stolen a television set earlier that evening during the burglary of another home. On appeal, Williams argued that the trial court had improperly admitted this statement during his trial for the burglary of Carpenter's home.[60] The Indiana Supreme Court upheld the trial court's admission on the grounds that it was relevant to establish Williams' intent and/or motive for the burglary.[61] The supreme court aptly and succinctly declared: "[T]here is no substantial question that the defendant committed the acts which led to the charge, but rather the issue is the defendant's motive or criminal intent" in breaking and entering.[62] Williams' confession of the television theft from another home was the only evidence of his motive and intent to commit the felony of theft in Carpenter's home and was crucial to proving all the elements of the charged burglary. This evidence would not have prejudiced the defendant before the jury and was therefore not legally irrelevant.

A similar Indiana Supreme Court decision just five weeks prior to *Williams* came to a similar conclusion but without the same reasoned analysis. In *Sizemore v. State*,[63] the facts were not nearly as clear as in *Williams*. A Mr. Abel chased the defendant and another intruder out of the ransacked second story of his home and forced them to surrender after he fired a shot into the rear of their car. Upon investigation, the

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[57]*See* FEDERAL PRACTICE & PROCEDURE, *supra* note 8, § 5246, at 513.

[58]Williams v. State, 489 N.E.2d 53 (Ind. 1986); Williams v. State, 481 N.E.2d 1319 (Ind. 1985).

[59]481 N.E.2d 1319 (Ind. 1985).

[60]*Id.* at 1321.

[61]*Id.* The then extant burglary statute defined the charged offense as follows:

> A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or if the building or structure is a dwelling, and a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

IND. CODE § 35-43-2-1 (1982).

[62]*Williams*, 481 N.E.2d at 1321.

[63]480 N.E.2d 215 (Ind. 1985).

police and Abel discovered on Abel's premises several items that had been stolen from two other homes that same day. The supreme court, in upholding the admission of these items into evidence, relied upon the intent and the common scheme or plan exceptions.[64]

The court did not precisely explain how the intent exception applied in *Sizemore*. However, the facts of this case fit within the *Williams* analysis described above. The evidence was relevant to show that the defendant intended to commit theft once he had entered the premises.[65] The court did explain that the items taken from other residences established a common plan or scheme of the defendant and his accomplice to burglarize residences that particular day.[66] The problem with the court's reasoning is that the court injected the "signature" requirement of the "modus operandi" exception into its explanation of the common scheme or plan exception, thereby confusing evidence of identity with evidence of intent.[67] There was no need for identity evidence because identity was never in question. The court's common scheme or plan analysis was also weak because the "distinctive" feature upon which the court focused was the manner of entry into the burglarized homes—kicking in the front door.[68] Such kicking is hardly distinctive, however, when even homeowners have been known to do the same thing to their own homes. Other than this flawed dictum, the court's review of the trial court's admission of the other crime evidence of theft, which circumstantially linked the defendant to all three locations, was sound.

A rather perfunctory result arose in *Brackens v. State*.[69] In that case, the defendant was accused of sexually molesting his seven-year-old niece by marriage.[70] The challenged evidence was the victim's testimony that the defendant had engaged in prior sexual acts with her.[71] The issue addressed by this evidence was the defendant's denial of the prior acts and his further denial that he had even touched the victim that day. The trial court allowed the testimony under the "depraved sexual instinct" exception, to show that the defendant had had prior sexual contact with the victim, despite his denial of the charged offense.[72]

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[64]*Id.* at 217.

[65]*Id.*

[66]*Id.* Such a conclusion might also have been appropriate to show the intent element, particularly since the defendant relied upon the defense of intoxication despite his testimony that he had accompanied the accomplice throughout the day. *See also* HANDBOOK OF EVIDENCE, *supra* note 49, § 190, at 448-49.

[67]*See supra* notes 42 and 43 and accompanying text.

[68]*Sizemore*, 480 N.E.2d at 217.

[69]480 N.E.2d 536 (Ind. 1985).

[70]*Id.* at 538.

[71]*Id.* at 539.

[72]*Id.*

The supreme court supported the trial court's ruling. However, the evidence of past acts in this case may not have been relevant to any specific factual dispute at issue. Such a blanket application of the depraved sexual instinct exception regardless of the facts exemplifies how courts tend to use this exception as a general rule when certain sex offenses are charged and there is evidence that the defendant has committed the same or a similar offense at another time.[73] Such uncritical application of the exception seems to undermine the general rule of exclusion. However, one commentator has defended this type of general use of the depraved sexual instinct exception by arguing that it creates an "issue" akin to a motive for committing the offense.[74] This "motive" is that the defendant has "a passion or propensity for illicit sexual relations *with the particular person* concerned in the crime on trial."[75] An implication that the defendant has a character flaw, such as a general propensity for this kind of behavior, is mitigated by limiting the evidence to a relationship with only the victim.[76] On this restricted basis, the admission of the evidence in *Brackens* was entirely appropriate and was no more prejudicial than the charged offense itself.[77]

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[73]*See* HANDBOOK OF EVIDENCE, *supra* note 49, § 190, at 449 n.40.

[74]*Id.* at 449-50.

[75]*Id.* at 449 n.38 (emphasis added).

[76]It would appear, however, that some Indiana cases have used the "depraved sexual instinct" exception without regard to whether the victim is the same in all of the offenses. *See, e.g.*, Austin v. State, 262 Ind. 529, 319 N.E.2d 130 (1974), *cert. denied*, 421 U.S. 1012 (1975); Miller v. State, 256 Ind. 296, 268 N.E.2d 299 (1971). The rationale for this expansion of the exception may be that the unnaturalness of the sex act is distinctive in and of itself. *See* HANDBOOK OF EVIDENCE, *supra* note 49, § 190, at 449. This is especially important now that the Indiana Supreme Court no longer categorizes rape among the exceptions for depraved sexual instinct (at least where consent is the only issue). *See, e.g.*, Jenkins v. State, 474 N.E.2d 84 (Ind. 1985); Malone v. State, 441 N.E.2d 1339 (Ind. 1982); Meeks v. State, 249 Ind. 659, 234 N.E.2d 629 (1968). But any extension of admissibility on the basis of the unusual nature of sex crimes lends itself to the dangers of admitting offenses that may only show a repeated commission of the same sort of crime rather than evidence of crimes with unusual features. Such a result has been decried by Indiana courts. *See, e.g.*, Duvose v. State, 257 Ind. 450, 452, 275 N.E.2d 536, 537 (1971) (rape); *see also* Raines v. State, 251 Ind. 248, 240 N.E.2d 819 (1968) (evidence of homosexual acts has no relevance at murder trial).

[77]The supreme court also noted that most of the victim's challenged testimony came forth during her cross-examination by the defense, as if to imply that any error in admission was harmless because the defendant "opened the door." *Brackens*, 480 N.E.2d at 539. *See also* Haynes v. State, 411 N.E.2d 659, 664 (Ind. Ct. App. 1980); Gilliam v. State, 270 Ind. 71, 76-77, 383 N.E.2d 297, 301 (1978). Such implication though misses the point when it was the *state* that first raised the topic on direct examination, although defendant's cross-examination on the subject could arguably be a waiver of any objection to the original direct testimony.

The irony is that the court misapplied the "opened door" exception later in the case. Brackens took the stand in his own defense to deny the charges. *Brackens*, 480

An interesting set of facts arose in *Gibbs v. State*,[78] where the defendant was convicted of attempted murder for a vehicular attack on a woman he later married.[79] On appeal, the defendant argued that the trial court erred in allowing the state to question him and the victim about their prostitution-related activities.[80] The defendant had a business as well as a romantic relationship with the victim, involving the victim's employment as a prostitute. At the time of the attack, the victim was preparing to leave the defendant's employ. The Indiana Supreme Court held that such evidence could well provide information about the defendant's motive for the attack.[81] Such evidence was deemed particularly

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N.E.2d at 539. In doing so, he put his credibility as a witness at issue. The state was thus justified in introducing evidence of his prior convictions for theft and robbery—infamous crimes—to impeach him. The court declared the defendant had "opened the door" for impeachment purposes. *Id.* at 540. While this evidence fits the classic Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972), formula for impeachment of Brackens' credibility, it has nothing to do with the "opened door" exception. *See supra* notes 4 and 5 and accompanying text. Although theft was not originally considered in the *Ashton v. Anderson* genre, the Indiana Supreme Court considered it a crime involving dishonesty and added it to the *Ashton* list in Fletcher v. State, 264 Ind. 132, 136-37, 340 N.E.2d 771, 774-75 (1976). However, admission of theft convictions can be prohibited if they "arise from factual situations which do not indicate a lack of veracity on the part of the witness." *Id.* at 137, 340 N.E.2d at 775. This limitation can only be triggered by defense counsel, preferably by motion in limine. *Id.* In the absence of a proper foundation by defense counsel, one must assume that Brackens' theft conviction was properly admitted for impeachment purposes.

A classic "opened door" testimony did arise in the murder/battery case of Davis v. State, 481 N.E.2d 387 (Ind. 1985). The defendant called one Coomes as a witness to buttress his claim of self-defense. Coomes testified about a conversation the defendant had had with his two victims during which the victims discussed their prison experiences. This evidence was adduced to substantiate the defendant's fear that these two men would seriously injure or kill him and to explain why he stabbed them during a fight. *Id.* at 389. What the defendant tried to "close the door" on was the fact that during that same conversation, he revealed to the victims that he too had been in prison. The trial court had allowed this fact to be brought out on Coomes's cross-examination. *Id.* The Indiana Supreme Court ruled that not only was this testimony highly relevant to rebut defendant's factual defense, but that he had also opened the door on direct examination. *Id.* As the court remarked:

> [O]ur courts frequently have held in other contexts that a party may not submit evidence of part of a conversation, transaction, deposition or the evidentiary material without giving the other party an opportunity to introduce the remaining material if it is necessary to explain or illustrate the context from which the excerpted evidence was taken, or to mitigate the prejudice caused by introduction of only part of the evidence in question.

Id. This correct statement of the exception contrasts starkly with the court's statements in *Brackens*.

[78] 483 N.E.2d 1365 (Ind. 1985).

[79] *Id.* at 1366.

[80] *Id.* at 1368.

[81] *Id.* A similar set of facts was present in Harms v. State, 156 Ind. App. 123, 295

relevant where motive was tied to the specific intent element of the attempted murder charge and where the victim denied that the defendant struck her intentionally.[82] Because the unrelated prostitution activities could hardly prejudice a jury trying an attempted murder case, the probative value of the evidence substantially outweighed any dangers of legal irrelevance, and the supreme court properly upheld the trial court.

The last example of a correctly-decided case dealt with a problem all too frequently encountered in trial courts. In *Riley v. State*,[83] the Indiana Supreme Court reversed a drug dealing conviction because the state had injected an "evidentiary harpoon" into the trial, under the guise of the common scheme or plan exception.[84] The trial court had granted the defendant's motion in limine to protect him from any mention of prior drug use or sales.[85] In spite of the court's order and the defendant's repeated objections, the prosecutor persisted in questioning the state's sole witness about prior buys from the defendant.[86] The trial court eventually relented and allowed the evidence upon a showing that there were similarities among all of the defendant's sales to the witness.[87]

In reversing, the supreme court declared there were no distinctive characteristics of the transactions to fit within the common scheme exception.[88] Thus, the evidence had been improperly admitted, particularly with respect to drug *use*.[89] The court then astutely observed that because the state's sole evidence was from a single witness, the "evidentiary harpoon"[90] of improper evidence injected by the state could only have bolstered its case unfairly before the jury.[91] The defendant was therefore granted a new trial.[92]

N.E.2d 156 (1973), where the deceased victim threatened to withdraw from a burglary ring and go to the police.

[82]*Gibbs*, 483 N.E.2d at 1366.

[83]489 N.E.2d 58 (Ind. 1986).

[84]*Id.* at 61.

[85]*Id.* at 59.

[86]*Id.* at 59-61.

[87]*Id.* at 61.

[88]*Id.* The court would probably have been more correct if it had addressed the "modus operandi" exception.

[89]*Id.*

[90]"Evidentiary harpoon" is defined in Indiana as that circumstance "where the prosecution through its witnesses successfully places evidence before the jury which is improper . . . in situations where such evidence would not be admissible." Grimes v. State, 258 Ind. 257, 262, 280 N.E.2d 575, 578 (1972) (citation omitted).

[91]*Riley*, 489 N.E.2d at 61. The evidence of prior sales was also not crucial to show that the witness could identify the defendant because they were also friends. *See, e.g.*, United States v. Juarez, 561 F.2d 65 (7th Cir. 1977).

[92]*Riley*, 489 N.E.2d at 61.

B. Right Result, Wrong Reason

In this next group of cases, the appellate courts reached the proper conclusion that evidence of other crimes fell within one of the permitted exceptions to the general rule of exclusion. However, the specific exceptions invoked by the courts were not necessarily correct.

In *Jones v. State*,[93] the supreme court clearly demonstrated the respect given to trial court discretion in ruling on the admissibility of evidence. The defendant was convicted of robbery and criminal deviate conduct for robbing a savings and loan association and forcing one of the female employees to disrobe and commit oral sodomy.[94] At trial, the victim of a similar crime testified to events occurring several weeks earlier at a gas station one-half block from the savings and loan. This witness had been unable to identify her attacker until the police showed her a picture of the savings and loan perpetrator. The defendant argued that evidence of the gas station incident was inadmissible at trial.[95]

The supreme court ruled the evidence admissible to prove the perpetrator's identity and to prove a common plan or scheme, because of the distinctive characteristics present in both crimes.[96] However, the common plan or scheme exception is used to "prove the existence of a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part."[97] Such a larger plan did not exist here nor did the court so hold. What the court was actually using, without properly identifying it, was the "modus operandi" exception wherein other crime evidence is admissible on the grounds of relevance because of the same distinct, unusual, or unique method employed in committing the charged offense.[98]

By repeated, improper use of the term "common scheme or plan," Indiana courts have bastardized the "modus operandi" exception by requiring something less than an unusual or unique device. Perhaps by connoting "common," "scheme," and "plan" instead of "modus operandi," the courts have felt compelled to admit evidence as meager as some vague pattern of behavior. As a consequence, many decisions have upheld the admission of evidence evincing no characteristics distinct from other crimes committed by other defendants under the rubric of "common

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[93]479 N.E.2d 44 (Ind. 1985).

[94]*Id.* at 44.

[95]*Id.* at 46.

[96]*Id.*

[97]HANDBOOK OF EVIDENCE, *supra* note 49, § 190, at 448-49 (footnote omitted).

[98]*See supra* notes 42 and 43 and accompanying text. One could argue that this is a hypertechnical distinction when in fact the unique features of both offenses, and not the name of the exception, were the actual test of admissibility in the case and the correct result was reached. The distinction is valid.

scheme or plan.'"[99] In other words, "similarities" has become the operative term, rather than "uniqueness." This lapse creates problems in a case such as *Jones v. State* where the only truly distinctive element of each offense was the combination of armed robbery at a business establishment with the commission of an act of oral sodomy upon a female employee.

But for the nature of the premises and the specific nature of the deviate sex act involved, *Jones* would be no different from any other offense combining violent larceny with a violent sex act. It is not unusual for rape and robbery to be combined during a residential burglary,[100] but it is arguable that forcing a victim to commit fellatio where the perpetrator risks detection during business hours of the targeted establishment is unique. Thus, in *Jones* there was minimal logical relevance of the other crime evidence to the issue of Jones' identity.[101] As for

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[99]In Wiles v. State, 437 N.E.2d 35 (Ind. 1982), the state put on the testimony of a prior rape victim during the burglary/attempted rape trial of the defendant. The "identification" exception (presumably common scheme or plan) was invoked to show the following similarities between the two events:

(1) the perpetrator threatened the victim with a knife;
(2) money and jewelry were stolen;
(3) the perpetrator wore a long-sleeved shirt in mid-summer;
(4) the attacks occurred in the same area of Indianapolis;
(5) the attacks were seventeen days apart; and
(6) the attacker cut the cords to the victims' extension phones.

Id. at 39. Unfortunately, this scenario is common in other run-of-the-mill rape/burglary offenses. *See, e.g.*, Williams v. State, 275 Ind. 434, 417 N.E.2d 328 (1981); Willis v. State, 268 Ind. 269, 374 N.E.2d 520 (1978). In fact, the common scheme or plan exception was also used in Williams v. State to admit factual similarities in two separate incidents of rape. The admitted facts were:

(1) two perpetrators;
(2) one wore a ski mask, the other a red hooded sweatshirt;
(3) obscene phone calls preceded the attacks;
(4) the victims' husbands worked nights, which was when the attacks occurred;
(5) the attackers pried open the back door and left it open afterwards;
(6) a butcher knife was used to threaten the victims;
(7) the victims' hands were tied;
(8) the perpetrators cut the phone wires;
(9) the attacks were about a week apart; and
(10) the attackers stole personal property.

Williams, 275 Ind. at 440, 417 N.E.2d at 332. The red hooded sweatshirt was perhaps a distinctive enough feature in *Williams* to justify admission of the evidence. However, there does not appear to have been any question of identity involved in the case.

[100]*See, e.g.*, Jenkins v. State, 474 N.E.2d 84 (Ind. 1985); Wiles v. State, 437 N.E.2d 35 (Ind. 1982); Williams v. State, 275 Ind. 434, 417 N.E.2d 328 (1981).

[101]The facts of *Jones* are not the least bit illuminating with regard to the defense of the case and whether identity was in serious dispute. Due to the seriousness of the crime, one can presume that the defendant denied any involvement, thereby putting his identity at issue.

legal relevance, prejudice to the defendant was diminished by the fact that both crimes were of the same inflammatory nature. Because the charged crime was highly offensive, a jury was unlikely to have been prejudiced by evidence of a second evil act. It would appear then that the Indiana Supreme Court's affirmance of Jones' conviction upon evidence having such a tenuous relevancy connection was a deferral to the trial court's discretion to admit such evidence.[102]

The next case in the "right result, wrong reason" genre is *Schoffstall v. State*.[103] Schoffstall was convicted of reckless homicide for the death of his infant son, which occurred while the baby was in Schoffstall's custody.[104] During trial, Schoffstall objected to the admission of autopsy photographs and to the testimony of a forensic pathologist that prior to the date of death, the baby had sustained numerous injuries to his spleen, left lung, lip, eye and cheek, and brain.[105] The pathologist concluded the baby was a victim of child abuse syndrome.[106] Schoffstall's wife also testified to circumstantial evidence of his abuse of the baby, and Schoffstall himself admitted during statements to police that he had hit the child. Schoffstall objected to the admission of this evidence on grounds of irrelevancy and immateriality.[107] The court of appeals concluded that the evidence was admissible under the relevancy exceptions of motive, intent, or common scheme or plan.[108]

The evidence was indeed admissible but not under any of these named exceptions. Although the facts are not clear with respect to what offense Schoffstall was charged with, it is clear he was convicted of reckless homicide.[109] The statutory elements of this crime are: "A person who recklessly kills another human being commits reckless homicide, a Class C felony."[110] Reckless homicide is not an "intentional" crime for

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[102]An argument can also be made for reversal. It appears that there was sufficient independent evidence of identity by the employees of the savings and loan to obviate the need for the other victim's testimony. One could also contend, obversely to the author's conclusion, that because the very nature of the crimes was so inflammatory, evidence of a second such crime by the defendant would have prejudiced the jury. Precedential authority would have permitted reversal under such circumstances. *See, e.g.*, Riddle v. State, 264 Ind. 587, 348 N.E.2d 635 (1976); Brooks v. State, 156 Ind. App. 414, 296 N.E.2d 894 (1973). Because of the abuse of discretion standard, however, the issue of reversal in *Jones* becomes an academic question the answer to which is dependent upon evidence which may be in the record but is not clearly set forth in the opinion.

[103]488 N.E.2d 349 (Ind. Ct. App. 1986).

[104]*Id.* at 351.

[105]*Id.* at 351-54.

[106]*Id.* at 351.

[107]*Id.* at 354.

[108]*Id.* at 355.

[109]*Id.* at 350.

[110]IND. CODE § 35-42-1-5 (1982).

which prior child abuse evidence would be relevant to show motive or intent, as it would for murder.[111] Use of the common scheme or plan exception is not justified either because typically child abuse is not a continuing *deliberate* plan or scheme but rather is the result of uncontrollable and/or irrational behavior continuing in an unplanned and erratic fashion throughout a parent (adult)/child relationship.

The valid relevance exception better suited for child abuse cases, although not yet adopted by Indiana courts, is the "corpus delicti" exception. The "corpus delicti" exception allows the admission of evidence of other crimes as proof that a criminal act took place.[112] This exception is particularly useful where the defendant acknowledges that harm occurred but denies that the harm was caused by any criminal instrumentality.[113] Refuting the defense of absence of "corpus delicti" requires a showing that the defendant has, in the past, engaged in similar criminal conduct.[114] The risk inherent in the "corpus delicti" exception is that it may be easily abused to show only propensity, a result scrupulously rejected by the case law.[115] However, in *Schoffstall*, evidence that the defendant's relationship with his son was characterized by instances of other criminally violent acts of physical abuse tended directly to rebut defendant's allegation that the child was injured by accident.[116]

Application of this "corpus delicti" exception should be limited to admission of evidence of a pattern of child abuse between the defendant and the victim. If so applied, the exception would be consistent with an ideal application of the depraved sexual instinct exception where evidence of criminal acts with *other* victims is excluded. Such a limitation would avoid the problems arising in cases such as *United States v. Woods*,[117] where the defendant's propensity for abusing children in general

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[111]*See* Worthington v. State, 273 Ind. 499, 405 N.E.2d 913 (1980), *cert. denied*, 451 U.S. 915 (1981) (defendant charged and convicted of second degree murder for death of seven-year-old adopted daughter); O'Conner v. State, 272 Ind. 460, 399 N.E.2d 364 (1980) (defendant charged with second degree murder of three-year-old child); Corbin v. State, 250 Ind. 147, 234 N.E.2d 261 (1968) (defendant indicted first degree, convicted second degree murder of 21-month-old daughter). In each of these cases, prior evidence of child abuse was admitted for the purpose of showing malice, premeditation, intent, or motive. These exceptions were appropriately applied because of the intentional nature of the charged and/or convicted offenses. *See* IND. ANN. STAT. § 10-3404 (Burns 1956) (second degree murder). For current version, see IND. CODE § 35-42-1-3 (1986).

[112]*See* FEDERAL PRACTICE & PROCEDURE, *supra* note 8, § 5239, at 460 (footnotes omitted).

[113]*Id.*

[114]*Id.*

[115]*Id.* at 460-61.

[116]*Schoffstall*, 488 N.E.2d at 354-55.

[117]484 F.2d 127 (4th Cir. 1973). In *Woods*, the defendant was convicted for the smothering death of her eight-month-old foster son, who died of cyanosis. *Id.* at 128-29.

became the chief characteristic of the evidence.[118] In *Schoffstall*, the evidence of previous abuse to the same infant was highly relevant to establish that a "corpus delicti" existed despite Schoffstall's representations of an accident. The logical relevance by sheer necessity substantially outweighed any potential prejudice. The court of appeals' reasoning notwithstanding, the evidence was properly admitted.

Hossman v. State[119] is not analyzed for its result as much as for the improper logic of its dicta. Hossman was convicted of burglary, conspiracy, and receiving stolen property.[120] The burglary and conspiracy convictions rested upon evidence that the defendant directed two other men to break into a home to steal some drinking glasses.[121] The defendant challenged testimony, allowed by the trial court, alleging that one of these same men had sold other goods to the defendant on prior occasions.[122] Pointing out that there was no criminality attached to these sales, the court of appeals noted that the sole purpose for their admission was to show an earlier connection between the defendant and this other man by reason of a business relationship.[123] However, the court went further and declared that even if the state's evidence had evinced criminality, it would have fit within the common scheme or plan exception to show identification, intent, or state of mind.[124] This declaration incorrectly invoked the common scheme or plan exception because there was no evidence that such a plan even existed or that the burglary was a part thereof. The common plan or scheme exception was therefore irrelevant.

What the court did point out, perhaps unwittingly, was that the evidence was relevant to show intent or motive. A close analysis of the facts and the targeted offenses reveals that the court made an excellent connection between the charged crime and the intent and motive ex-

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The prosecution was allowed to submit evidence that the defendant had been involved in twenty earlier cyanotic episodes with nine different children, seven of whom died. *Id.* at 130. The controversy, of course, was balancing the difficulty of proving that the death of the infant was caused by a criminal instrumentality and thus "corpus delicti" with the prejudice inherent in admitting the evidence purely to show the defendant's character flaw. The controversy will continue to rage but is really of no moment in the classic parent/battered child relationship, such as in *Schoffstall*, where the abuse is part of a continuing relationship.

[118] *Id.* at 130-32.

[119] 482 N.E.2d 1150 (Ind. Ct. App. 1985).

[120] *Id.* at 1152-53. His conviction for receiving stolen property was reversed on a separate appeal. *Id.* at 1153. The burglary and conspiracy convictions resulted from a new trial after the first was declared a mistrial. *Id.* at 1152-53.

[121] *Id.* at 1152.

[122] *Id.* at 1157.

[123] *Id.*

[124] *Id.*

ceptions for relevancy. Evidence of Hossman's prior receipt of stolen goods would supply a motive[125] for his vicarious involvement in the burglaries committed by other parties, as well as show the specific intent of theft, the predicate for burglary. Although Hossman's conviction for receiving stolen property was overturned, the relevancy link is clear and is sufficient to justify the admission of this evidence going to issues that could not help but be in dispute because of Hossman's limited role in the commission of the crime.

C. No Harm, No Foul

Several cases in the survey period improperly upheld the admission of other crime evidence; however, a thorough examination reveals that in each case the admission was harmless. One example is *Foster v. State*,[126] which otherwise would be an excellent example of the common scheme or plan exception. In *Foster*, a jury found the defendant guilty of forgery for signing his employer's name on a stolen blank payroll check and then cashing it.[127] Among the evidence presented were three other payroll checks cashed the same day that were within the numerical sequence of the subject check. The conclusion was that the defendant had embarked upon a calculated plan to obtain money through fraud.[128] This is a classic example of a common scheme or plan, where evidence is excepted from the general rule of exclusion because it tends to prove a fact at issue, such as the identity of the perpetrator or the defendant's intent. The problem in *Foster* is that, contrary to the court's rationale, there appears to have been no question of the defendant's identity at trial.[129] Nor would these checks necessarily have presented any more definite evidence of intent to defraud than the single check upon which the information had been filed. There appears to have been no serious dispute over any issue requiring this evidence to make the state's case. If not, the three "unrelated" checks should have been ruled inadmissible. However, any error was rendered harmless when the defendant's brother testified, evidently without objection, to the defendant's illegal transactions with these other checks, thereby making the erroneously admitted evidence cumulative only.[130] The improperly admitted

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[125]For good examples of the use of the motive exception, see Jenkins v. State, 263 Ind. 589, 590-92, 335 N.E.2d 215, 216-17 (1975); Thomas v. State, 263 Ind. 198, 199-201, 328 N.E.2d 212, 212-13 (1975).

[126]484 N.E.2d 965 (Ind. 1985).

[127]*Id.* at 966.

[128]*Id.* at 967.

[129]Bank employees, called as witnesses, identified the defendant. *Id.* The court ruled that the other checks "reinforced identification testimony." *Id.*

[130]*Id.*; *see* Wallace v. State, 486 N.E.2d 445, 461 (Ind. 1985) (improperly admitted

other crime evidence in *Foster* was therefore rendered nonprejudicial as a matter of law.

Clarkson v. State[131] presented another classic example of a common scheme or plan. The defendant was convicted of theft and violation of state securities laws for defrauding an elderly couple under the guise of an investment plan.[132] The questionable evidence here was the testimony of three other elderly women, who told of their own experiences with the defendant's confidence scheme.[133] As in *Foster*, the evidence was presumably admitted to show intent to defraud.[134] And as in *Foster*, such testimony had no greater tendency to show intent than the evidence of the charged offense itself. The other three incidents were unnecessary to the prosecution's case. The error here is particularly acute because intent is not required to violate the securities laws,[135] and the court never addressed the requirement of "intent to deprive" of use under the theft statute.[136] Therefore, the evidence was irrelevant to any question of intent to defraud under the securities laws because this was not an issue at trial. And clearly the theft intent was also not the issue. Because the other women's testimony had no logical relevance to any issue of intent, the evidence was inadmissible on this basis.

The court though did state that the women's testimony was crucial to show a *scheme* to defraud,[137] which is an element of a securities law violation. Again however, the testimony had no greater probity than the evidence of the subject offense and was therefore an unnecessary presentation of cumulative evidence on an issue already adequately supported by other evidence. But, as in *Foster*, any error was rendered harmless by the defendant's failure to object to the testimony of two of the witnesses.[138]

A third common scheme or plan was present in *Alvers v. State*.[139] Alvers was a jeweler who had a habit of receiving stolen property and of substituting cubic zirconias for diamonds in jewelry left in his care for repair. The grand jury indicted him for corrupt business influence upon seven predicate offenses of this nature.[140] At trial, the objectionable

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evidence does not require reversal if cumulative of other evidence); Johnson v. State, 251 Ind. 369, 374, 241 N.E.2d 270, 272 (1968).

[131]486 N.E.2d 501 (Ind. 1985).

[132]*Id.* at 503.

[133]*Id.* at 506.

[134]*Id.*

[135]Briefly, Indiana state securities laws presume criminal intent from a defendant's acts. *Id.* at 507. *See* IND. CODE § 23-2-1-1 (1982).

[136]*See* IND. CODE § 35-43-4-2(a) (1986).

[137]*Clarkson*, 486 N.E.2d at 506.

[138]*Id.*

[139]489 N.E.2d 83 (Ind. Ct. App. 1986).

[140]*Id.* at 85; *see* IND. CODE § 35-45-6-2 (1982).

evidence was the testimony of two other victims of Alvers' operation.[141] The testimony was allowed as proof of a common scheme or plan.[142] But of what practical necessity was this testimony when the seven predicate offenses raised the inference of such scheme anyway? The evidence was improperly admitted. Its admission was harmless, though, because the testimony of the other victims could have had little, if any, prejudicial effect on the jury's deliberations.[143] The trial's outcome would not have been different even had this testimony been excluded because the great weight of the evidence of a common scheme or plan presented by the seven separate charges would have convicted Alvers anyway.

In *Graham v. State*,[144] the defendants were charged with and convicted of involuntary manslaughter, reckless homicide, and the unlawful practice of medicine in the death of one Sybil Bennett.[145] The Grahams had established Hoosier Health House in order to treat individuals with medical problems by naturopathic means, in accordance with the teachings of a prophet of the Seventh Day Adventist Church. Bennett went to the Grahams for treatment of a lump on her breast. Without the benefit of conventional medical treatment, Bennett eventually died under the Grahams' care from complications of breast cancer. At trial, the state introduced evidence that the Grahams were administering and charging for similar services provided to other people.[146] The court of appeals upheld the admission of this evidence for purposes of showing "intent, motive, purpose, identification, or a common scheme or plan."[147] This bare recital of the general exception, with no further explanation, was the only rationale given. At most, the evidence showed a common scheme to engage in the unlawful practice of medicine, but there was no issue in dispute requiring the evidence as proof of identity or intent. The evidence pertinent to Bennett's death was sufficient to show the defendants' unlawful practice of medicine. More evidence of the same character, presented even as part of a scheme, would not have had any tendency to make the existence of the unlawful practice of medicine any more probable than without it. Nor was the evidence relevant to any material issue of fact as to the manslaughter and reckless homicide charges. The evidence was irrelevant and therefore improperly admitted. However, as in *Alvers*, because of the sheer weight of the state's case, there was no danger that the improper admission misled or unfairly prejudiced the jury; it was harmless error.

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[141] *Alvers*, 489 N.E.2d at 89.

[142] *Id.* at 90.

[143] *See, e.g.*, Gill v. State, 467 N.E.2d 724, 725 (Ind. 1984); Brewster v. State, 450 N.E.2d 507, 510 (Ind. 1983).

[144] 480 N.E.2d 981 (Ind. Ct. App. 1985).

[145] *Id.* at 983-84 (footnotes omitted).

[146] *Id.* at 992.

[147] *Id.*

The second *Williams v. State*[148] case involved Williams' conviction for the other burglary he confessed to committing after his apprehension in Mrs. Carpenter's home.[149] To review briefly, Williams was convicted for burglary of the Carpenter home. His confession to an earlier burglary and theft was used to establish his intent to commit theft in the Carpenter home.[150] The state's case here, the prosecution of that other burglary, was based upon Williams' confession, the presence of a stolen television nearby, and fresh blood matching Williams' blood type found on the burglarized premises.[151] During trial, the state was granted leave to describe Williams' arrest in Carpenter's home, especially the fact that he was bleeding at the time.[152] There is no problem with the admission of evidence that Williams was bleeding at the time of his arrest; what was error was the admission of evidence of the situs of the arrest. The state's evidence of Williams' presence at the first house (blood) and of the theft of the television therefrom was sufficient for conviction. The fact that Williams was in Carpenter's house at the time of his arrest and had committed another burglary there had no probative value to the state's case and was erroneously admitted. It was harmless error, however, for the same reason as in *Graham* and *Alvers*; the evidence of the charged offense and of the defendant's guilt was not so equivocal as to have unfairly affected the jury.

The error in the next "no harm-no foul" case was also harmless by reason of the very limited effect the improper evidence could have had on the jury. *Forehand v. State*[153] involved the defendant's conviction for dealing in phencyclidine (PCP), a Schedule II controlled substance.[154] During the state's examination of the arresting officers, an earlier sale of marijuana, made at the defendant's direction, was revealed.[155] The Indiana Supreme Court upheld the admission of the testimony on the basis of *res gestae*.[156] The marijuana sale was held to be part and parcel of the negotiation and sale of the PCP even though the marijuana sale was three days before the commission of the charged offense.[157]

The application of the *res gestae* exception was stretched beyond its limits. As the court itself stated, "Under the *res gestae* exception evidence may be introduced which completes the story of the crime by proving its *immediate* context . . . ."[158] There was no "immediacy" to the context

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[148]489 N.E.2d 53 (Ind. 1986).

[149]*See supra* notes 58-60 and accompanying text.

[150]*See supra* note 61 and accompanying text.

[151]*Williams*, 489 N.E.2d at 55.

[152]*Id.*

[153]479 N.E.2d 552 (Ind. 1985).

[154]*Id.* at 554.

[155]*Id.*

[156]*Id.*

[157]*Id.* at 554-55.

[158]*Id.* at 554 (emphasis added).

here of three days' passage of time.[159] Even the civil application of the *res gestae* doctrine could not be extended to justify such a broad application.[160] The *res gestae* exception simply did not apply, and it was error to admit the evidence of the marijuana sale.

One could perhaps argue that the common plan or scheme exception would be appropriate, but the relevancy of a marijuana sale would be difficult to establish at a trial for dealing in PCP. However, there is the possibility that the marijuana sale exhibited a common plan to sell controlled substances of all kinds. The problem though is that there was no issue in dispute requiring proof of such a plan. When the strength of the state's direct evidence from the testimony of the undercover officers is considered, there was no element left to be proven that was not brought out by their statements. However, because of this strength of the state's case and the discretion given to the trial court, the error in admission of this other crime evidence can only be deemed harmless.

The last of the "harmless error" cases is *Wooden v. State*,[161] in

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[159]*See, e.g.*, Moster v. Bower, 153 Ind. App. 158, 170, 286 N.E.2d 418, 425 (1972); Tenta v. Guraly, 140 Ind. App. 160, 170-71, 221 N.E.2d 577, 582-83 (1967) (*res gestae* statements must relate to main event).

[160]The court cites to a case expanding the *res gestae* exception outside the immediate time frame to justify the evidence here. *Id.* at 555. (citing Altman v. State, 466 N.E.2d 716 (Ind. 1984)). But that still does not prevent the conclusion that use of the *res gestae* exception in criminal trials in Indiana has been stretched far beyond the definition of the term given in Lee v. State, 267 Ind. 315, 320, 370 N.E.2d 327, 329 (1977) (citation omitted) as "acts, statements, occurrences and circumstances substantially contemporaneous with the crime charged." In the civil context, *res gestae* refers to a "spontaneous and instinctive reaction to a startling or unusual occurrence during which interval certain statements are made under such circumstances as to show lack of forethought or deliberate design in the formulation of their content" and is used as an exception to the hearsay rule. *Moster*, 153 Ind. App. at 170, 286 N.E.2d at 425 (emphasis deleted). *See also Tenta*, 140 Ind. App. at 170-71, 221 N.E.2d at 582-83. Its application in criminal law should ideally have the same immediacy limitations but not necessarily as an exception to anything, much less as a rule of exclusion of other crime evidence.

What reflection can other crimes committed as part of or immediately with reference to the charged offense have upon the defendant's character? How can it prejudice a defendant's case as being unfairly entered into evidence? There seems to be no valid reason for applying the rule of exclusion to "necessary parts of the proof of an entire deed," "inseparable elements of the deed," or "concomitant parts of the criminal act." 1A J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 218 (3d ed. 1983). So why even have a *res gestae* exception in criminal law? *See* Wilson v. State, 491 N.E.2d 537 (Ind. 1986) (application of *res gestae* exception conforms to Wigmore's non-exception). If there is evidence of other crimes that are part and parcel of a common plan or scheme, but which are inadmissible under *res gestae* because of a lack of immediate context, other exceptions already exist to allow admissibility. It therefore might be wise to consider the abolition of the rule altogether in the criminal context and either admit the other crime evidence as an inseparable portion of the charged crime or under the common scheme or plan exception.

[161]486 N.E.2d 441 (Ind. 1985).

which the defendant was on trial for robbery.[162] The trial court granted his motion in limine to prohibit the state from eliciting testimony that he may have been involved in any other offense while armed with a gun.[163] The testimony of the officer who investigated the instant offense revealed that the defendant's mug shot was shown to the victim for identification. The trial court overruled a defense motion for mistrial, and the Indiana Supreme Court affirmed.[164] The court declared that the testimony did not exceed the boundaries of the motion in limine and only explained the officer's investigation.[165]

Besides the fact that the officer's investigation appeared to be of little relevance to the charged offense, there was absolutely no need for his testimony that the police had a photograph of the defendant in their files. Mug shots and any references thereto are, with rare exceptions, inadmissible because of their tendency to show that a defendant has committed or was a suspect in other crimes.[166] The gratuitous injection of this information may well have been inadvertent, but it was nonetheless improper. The defendant's motion for mistrial was properly denied, though, because he could not possibly have been prejudiced by the improper evidence. The victim positively and unequivocally identified the defendant as the robber. In fact, shortly after the crime, the victim recognized him on the street and followed him before calling the police. Any error in the reference to the defendant's police photograph was therefore harmless.

D. Wrong Result

The only case during the survey period in which an error in admission of other crime evidence may well have been prejudicial was *Stout v. State*.[167] This conclusion is based upon the facts revealed in the opinion. A review of the actual trial transcript might lead to a different conclusion, but this analysis is confined to the recitation of facts in the reported case.

In *Stout*, the offending evidence was initially entered via testimony of the defendant's accomplice in burglary and theft.[168] The accomplice

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[162]*Id.* at 442.

[163]*Id.*

[164]*Id.* at 443.

[165]*Id.*

[166]Police investigation evidence was properly restricted in Williams v. State, 491 N.E.2d 540, 541 (Ind. 1986) (police officer not allowed to testify to defendant's initial arrest on unrelated charge), but was not in O'Grady v. State, 481 N.E.2d 115, 119-20 n.1 (Ind. Ct. App. 1985) (conviction reversed where police officer's testimony of informant's story went beyond established bounds of non-objectionable hearsay).

[167]479 N.E.2d 563 (Ind. 1985).

[168]*Id.* at 567.

implicated the defendant as a participant in multiple burglaries committed prior to the charged offense. The Indiana Supreme Court upheld the admission of this evidence "to show common scheme or plan, intent, purpose or identity."[169] It furnished no further illumination than a citation to another case, *Foresta v. State*.[170] Unfortunately, *Foresta* is as scantily reasoned as *Stout* and refers only to other crime evidence pertinent to proof of identity.[171] Identity was not at issue in *Stout*. The common plan or scheme exception might be relevant if the facts of the case were clearer because the defendant and his accomplice apparently committed several burglaries within a short time period. However, there is no evidence in the opinion to justify a conclusion that the defendant engaged in a common plan or scheme for a singular purpose. The defendant's activities were simply a series of multiple unrelated offenses of which the charged offense was only one.[172] The only other value the evidence had was to show criminal propensity, which is an impermissible use. The admission of the accomplice's testimony cannot be deemed legally harmless because other improper evidence was later admitted upon the ground that the accomplice's testimony was properly admitted.

During the further course of the state's case, a police officer testified to the course of his investigation leading to the arrest of the defendant.[173] During this testimony, the officer discussed the whereabouts of the defendant and his accomplice on the days prior to the charged crime.[174] Although the opinion does not recite the actual testimony, it is evident that it concerned the other break-ins and the defendant's role in them. The supreme court upheld the admission of the officer's testimony based in part upon the admissibility of the accomplice's testimony.[175] But, as already pointed out, that testimony was improperly admitted. Therefore, the officer's testimony was also improperly admitted. The sum effect of these two errors added to the posture of the case as otherwise set forth in the opinion indicates that reversal was required.

The other crime evidence elicited from these two witnesses had no logical relevance to any material fact at issue in the trial. The majority of the state's case appears to have rested on the credibility of the accomplice's testimony as to the facts.[176] His credibility could only have been bolstered by the corroborating testimony of a police officer. Ad-

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[169]*Id.*

[170]274 Ind. 658, 413 N.E.2d 889 (1980).

[171]*Id.* at 660, 413 N.E.2d at 890-91.

[172]In fact, the supreme court itself treated the charged offense as being motivated by a need for money, which is presumably in contradistinction to whatever undisclosed reason motivated the other offenses. *Stout*, 479 N.E.2d at 565.

[173]*Id.* at 567.

[174]*Id.* at 568.

[175]*Id.*

[176]Also diminishing the persuasiveness of the state's case is the fact that the home

mission of the other crime evidence obviously enhanced the prosecutor's case in the eyes of the jury. However, the evidence was used only to show the defendant's propensity for crime rather than substantively to prove his guilt of the charged offense. Therefore, this evidence, both legally and logically irrelevant, caused prejudicial error and the case should have been reversed for a new trial.[177]

IV. Conclusion

After this cursory glance at the notable cases in this survey period, it is apparent that the appellate courts of Indiana have properly applied the other crime exceptions less than fifty percent of the time, at least in published opinions. It is difficult to determine why there is a problem in this area. It is not difficult to imagine that in the heat of trial, minor errors will be made by both the bench and the trial attorneys. Some of these exceptions are based on subtle nuances in the facts, and the speed at which a trial is conducted is not always conducive to sorting through these nuances to reach a proper decision. Under the circumstances, it is remarkable that even though the published opinions improperly applied the law so often, the trial courts actually erred only once.

There is a remedy which will prevent the occurrence of the errors made in the survey opinions which are more often errors of analysis than of substance. That solution is to know the facts of each case. Only a thorough knowledge of the facts present in *both* the state's and the defense's cases can give one a proper perspective of the context in which other crime evidence can be examined. This knowledge must be supplied by the trial attorneys in both their presentation at trial and on appeal. When the attorneys have supplied the cogent facts, the trial courts can apply the law. In doing so, the courts must assume the exclusion applies unless and until the facts and their unique juxtaposition warrant the application of a specifically tailored exception for a specifically accepted purpose. The law in Indiana allowing admission of other crime evidence despite the general prohibition is not without logic and reason, but by its very principles, it can be applied only sparingly. Such a thoughtful approach to the law will clarify the exceptions for the trial bench and will establish proper guidelines for the trial bar.

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where the stolen items were found was not within the defendant's exclusive control and was accessible to other parties, including the accomplice. *See id.* at 565.

[177]*See, e.g.*, Brooks v. State, 156 Ind. App. 414, 296 N.E.2d 894 (1973) (prejudicial error to admit evidence of other thefts not reduced to conviction of defendant to show behavioral pattern).